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6 **UNITED STATES DISTRICT COURT**  
7 **DISTRICT OF NEVADA**  
8

9 RICHARD HOLLEN PRUITT, )

10 Petitioner, )

11 vs. )

12 DON HELLING, *et al.*, )

13 Respondents. )  
14 \_\_\_\_\_ )

3:03-cv-0685-RLH-VPC

**ORDER**

15  
16 **I. Introduction**

17 This action is a petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254, by  
18 Richard Pruitt, a Nevada prisoner. The action comes before the court with respect to its merits. The  
19 court will deny the petition.

20 **II. Facts and Procedural Background**

21 Petitioner was charged in the Third Judicial District Court for Lyon County with two  
22 counts of sexual assault on a child under the age of fourteen and one count of sexual assault, for  
23 alleged sexual molestation of his daughter, after a preliminary hearing was held on December 7,  
24 1993. Exhibits 8, 12 and 48.<sup>1</sup> Petitioner proceeded to trial, and on October 30, 1995, the jury  
25 \_\_\_\_\_

26 <sup>1</sup> The exhibits cited in this order are those filed by respondents in support of their motion to dismiss and are located in the record at docket #11-19.

1 convicted him of all three counts as charged. Exhibits 52-58, 60-62. The trial court sentenced  
2 petitioner on November 27, 1995, to two terms of life imprisonment with parole eligibility in ten  
3 years for counts I and II, and to one term of life imprisonment with parole eligibility in five years for  
4 count III, with all counts running concurrently. Exhibit 69. The state district court entered a  
5 judgment of conviction on November 30, 1995. Exhibit 70.

6           Petitioner appealed, raising five claims: (1) the state denied petitioner a fair trial by  
7 knowingly failing to elicit the truth; (2) the statements of the district attorney in his closing argument  
8 amounted to prosecutorial misconduct; (3) the trial court's order prohibiting certain cross-  
9 examination violated petitioner's right to confront witnesses; (4) the district court committed  
10 reversible error in the admission of bad acts; and (5) cumulative errors deprived petitioner of a fair  
11 trial. Exhibits 72 and 82. The Nevada Supreme Court affirmed the judgment of conviction on  
12 February 27, 1998. Exhibit 95. Petitioner moved for rehearing, but the court denied rehearing on  
13 March 14, 1998. Exhibits 96 & 100. Remittitur issued on May 22, 1998. Exhibit 102.

14           Petitioner then filed a state petition for habeas corpus on May 14, 1999, arguing (1) trial  
15 counsel was ineffective for failing to interview and call Roberta Lamkin at trial; (2) trial counsel was  
16 ineffective for failing to call Denise Weathers and Megan Higgins as witnesses at trial; (3) trial  
17 counsel was ineffective for failing to provide evidence of the victim's prior sexual knowledge and  
18 for failing to call witnesses Carie Griffin and Kathryn Pruitt; (4) trial counsel was ineffective for  
19 failing to call Mike Higgins and Joyce Silva as witnesses; (5) a claim of cumulative error; and (6)  
20 and (7) newly discovered evidence. Exhibit 105. Petitioner also filed a supplemental habeas corpus  
21 petition, alleging additional witnesses counsel should have called to testify at trial. Exhibit 115.  
22 Petitioner then filed a second supplemental petition for writ of habeas corpus. Exhibit 146.

23           On April 10 and 11, 2002, the state district court held an evidentiary hearing on the  
24 petition for writ of habeas corpus. Exhibits 155 and 156. The state district court then dismissed the  
25 petition. Exhibit 168. Petitioner appealed, and the Nevada Supreme Court affirmed the lower  
26 court's dismissal of the petition. Exhibits 170 and 199. Remittitur issued on September 19, 2003.

1 Exhibit 204.

2           Petitioner filed a federal habeas corpus petition with this court on December 12, 2003  
3 (docket #1). On March 18, 2005, respondents moved to dismiss the petition, arguing several  
4 grounds were unexhausted or failed to state a claim (docket #27). The court granted the motion to  
5 dismiss, finding grounds two, three, and four were unexhausted and grounds seven and eight failed  
6 to state a claim (docket #31). Petitioner moved to reconsider, and abandoned grounds two and four  
7 (docket #32). The court denied the motion to reconsider (docket #35). Petitioner then abandoned  
8 ground three (docket #36). Respondents have now answered petitioner's remaining claims (docket  
9 #39) and petitioner has filed a traverse (docket #45).

### 10 **III. Federal Habeas Corpus Standards**

11           The Antiterrorism and Effective Death Penalty Act ("AEDPA"), provides the legal  
12 standard for the Court's consideration of this habeas petition:

13           An application for a writ of habeas corpus on behalf of a person in  
14 custody pursuant to the judgment of a State court shall not be granted  
15 with respect to any claim that was adjudicated on the merits in State court  
16 proceedings unless the adjudication of the claim --

17           (1) resulted in a decision that was contrary to, or involved an  
18 unreasonable application of, clearly established Federal law, as  
19 determined by the Supreme Court of the United States; or

20           (2) resulted in a decision that was based on an unreasonable  
21 determination of the facts in light of the evidence presented in the State  
22 court proceeding.

23 28 U.S.C. §2254(d).

24           The AEDPA "modified a federal habeas court's role in reviewing state prisoner  
25 applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are  
26 given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693 (2002). A state  
court decision is contrary to clearly established Supreme Court precedent, within the meaning of 28  
U.S.C. § 2254, "'if the state court applies a rule that contradicts the governing law set forth in [the  
Supreme Court's] cases'" or "'if the state court confronts a set of facts that are materially

1 indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result  
2 different from [the Supreme Court's] precedent.” *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003)  
3 (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000), and citing *Bell*, 535 U.S. at 694).

4 A state court decision is an unreasonable application of clearly established Supreme  
5 Court precedent “‘if the state court identifies the correct governing legal principle from [the Supreme  
6 Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case.’”  
7 *Lockyer*, 538 U.S. at 75 (quoting *Williams*, 529 U.S. at 413). The unreasonable application clause  
8 “requires the state court decision to be more than incorrect or erroneous”; the state court's  
9 application of clearly established law must be objectively unreasonable. *Id.* (quoting *Williams*, 529  
10 U.S. at 409). *See also Ramirez v. Castro*, 365 F.3d 755 (9th Cir. 2004).

11 In determining whether a state court decision is contrary to, or an unreasonable  
12 application of, federal law, this Court looks to a state court's last reasoned decision. *See Ylst v.*  
13 *Nunnemaker*, 501 U.S. 797, 803-04 (1991); *Plumlee v. Masto*, 512 F.3d 1204, 1209-10 (9th Cir.  
14 2008) (en banc). When a state court has not “explained its reasoning on a particular claim” the  
15 federal court conducts “an independent review of the record to determine whether the court's  
16 decision was objectively unreasonable.” *Sass v. California Board of Prison Terms*, 461 F.3d 1123,  
17 1127 (9th Cir. 2006) (citing *Lewis v. Mayle*, 391 F.3d 989, 996 (9th Cir. 2004)).

18 Moreover, “a determination of a factual issue made by a State court shall be presumed  
19 to be correct,” and the petitioner “shall have the burden of rebutting the presumption of correctness  
20 by clear and convincing evidence.” 28 U.S.C. § 2254(e)(1).

#### 21 **IV. Discussion**

##### 22 **A. Ground One**

23 In his first claim for relief petitioner alleges that his conviction and sentence are a  
24 product of a violation of his Fifth, Sixth, and Fourteenth Amendment rights, as he was not allowed to  
25 introduce evidence that he caught the victim in bed with her boyfriend engaging in the same sexual  
26 activity she later attributed to the petitioner. Petitioner contends that the victim filed a formal

1 accusation against him because he did not allow the victim to have further contact with her boyfriend  
2 after she was caught. Petitioner asserts that he wanted to introduce evidence that the victim had  
3 engaged in sexual acts with her boyfriend Chuck in order to show that the victim had knowledge of  
4 sexual acts from someone else. Furthermore, petitioner states that he obtained newly discovered  
5 information from a person named Carie Griffin that in the summer of 1991 the victim engaged in  
6 sexual acts with two other boys named Mark and Craig. Petitioner states that this evidence would  
7 have shown bias on the part of the victim, and a motivation to present false charges.

8 Prior to trial petitioner filed a motion to allow cross-examination of the victim  
9 regarding her sexual activity. Exhibit 15. The trial court held a hearing on the issue, and the court  
10 found that the evidence petitioner wished to introduce, of the victim's sexual activities with her  
11 boyfriend, would violate the rape shield statute. Exhibits 19 and 21.

12 Petitioner raised the instant ground for relief in his direct appeal, and the Nevada  
13 Supreme Court rejected the claim, stating:

14 Appellant next contends that his right of confrontation was  
15 infringed when he was denied the opportunity to cross-examine his  
16 daughter regarding alternate sources of her sexual knowledge. We  
17 conclude that this argument is without merit. Appellant's argument that his  
18 twelve year-old daughter acquired sexual knowledge through her  
19 relationship with her boyfriend, and then used this knowledge to assert  
20 unfounded allegations against him, is undermined by the fact that evidence  
21 adduced at trial demonstrated that the victim had revealed to a friend that  
22 her father was sexually abusing her months before she began dating her  
23 boyfriend. Thus, there was no proper purpose other than to impermissibly  
24 impeach the victim's general credibility and chastity. *See* NRS 50.090.  
25 *Compare Summitt v. State*, 101 Nev. 159, 697 P.2d 1374 (1985)  
26 (concluding that the district court erred in denying appellant the opportunity  
to introduce evidence pertaining to the five year-old victim's previous  
sexual assault where appellant's intent was not to impeach the victim's  
credibility and chastity but to demonstrate that the victim had independent  
sources of sexual knowledge). Accordingly, we conclude that the district  
court did not commit manifest error in denying appellant the opportunity  
to cross-examine the victim regarding alternate sources of her sexual  
knowledge.

Exhibit 95 at 2-3. Furthermore, on appeal from the lower court's dismissal of the state habeas  
corpus petition the Nevada Supreme Court found the following:

1 With regard to the evidence of the sexual knowledge Pruitt's  
2 daughter allegedly acquired during the August 1991 camping trip, this  
3 evidence would not be admissible because his daughter had already told a  
4 friend prior to this camping trip that Pruitt had molested her. Accordingly,  
5 as this court concluded with regard to the evidence of sexual knowledge  
6 Pruitt's daughter allegedly acquired from her teenage boyfriend, there  
7 would be no proper purpose for admitting this evidence other than to  
impermissibly impeach her character and chastity. [fn 7: *See Summitt v.*  
*State*, 101 Nev. 159, 163-64, 697 P.2d 1374, 1377 (1985) (holding that  
evidence of a victim's prior sexual experiences was admissible to  
demonstrate sexual knowledge in connection with alleged fabrication, not  
to impeach the witness's character for chastity).

Exhibit 199 at 4.

8 The Confrontation Clause "guarantees the right of an accused in a criminal  
9 prosecution to be confronted with the witnesses against him." *Delaware v. Van Arsdall*, 475 U.S.  
10 673, 678 (1986). The main purpose of the confrontation of witnesses is to allow a defendant the  
11 opportunity to cross-examine witnesses. *Id.* (citing *Davis v. Alaska*, 415 U.S. 308 (1974)). The  
12 right to cross-examine "includes the opportunity to show that a witness is biased, [or that] the  
13 testimony is exaggerated or unbelievable." *Fowler v. Sacramento County Sheriff's Dept.*, 421 F.3d  
14 1027, 1035 (9th Cir. 2005) (citing *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987)). Furthermore,  
15 exposure of a witness's motivation for testifying is a proper and important function of the right to  
16 cross-examine a witness. *Davis*, 415 U.S. at 316-17. However, the Confrontation Clause does not  
17 prevent a trial court "from imposing any limits on defense counsel's inquiry into the [reliability or  
18 credibility] of a prosecution witness." *Id.* Trial courts "retain wide latitude insofar as the  
19 Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on  
20 concerns about, among other things, harassment, prejudice, confusion of the issues, the witness'  
21 safety, or interrogation that is repetitive or marginally relevant." *Id.* (citing *Van Arsdall*, 475 U.S. at  
22 679).

23 To determine whether a criminal defendant's Sixth Amendment right to confrontation  
24 has been violated by limiting cross-examination of a witness, a court must determine whether: (1) the  
25 evidence was relevant; (2) there were other legitimate interests outweighing the defendant's interests  
26 in presenting the evidence; and (3) the exclusion of the evidence left the jury with sufficient

1 information to assess the credibility of the witness. *United States v. James*, 139 F.3d 709, 713 (9th  
2 Cir. 1998) (quoting *Wood v. Alaska*, 957 F.2d 1544, 1549-50 (9th Cir. 1992)); *Morales v. Scribner*,  
3 621 F.Supp.2d 808, 824-25 (N.D. Cal. 2008). In the instant case the evidence petitioner wished to  
4 introduce about the victim's prior sexual history was not relevant, as the victim's sexual experiences  
5 with her boyfriends occurred after the sexual assault had already occurred. Moreover, the sexual  
6 history of the victim had no bearing on her credibility as petitioner was not alleging that she had  
7 made prior false accusations or that she had previous consensual sexual encounters with the  
8 petitioner. See *Morales*, 621 F.Supp.2d at 824-25; *Wood*, 957 F.2d at 1551 (discussing how a  
9 sexual assault victim's sexual history with others only shows a "generalized attitude toward sex that  
10 says little if anything about the victim's attitude toward sex with the defendant"). The trial court's  
11 limitation on petitioner's ability to cross-examine the victim about her prior sexual activity did not  
12 violate the Confrontation Clause. Moreover, there is no indication that the state district court's  
13 limitation on the defense's ability to cross-examine the victim had a substantial and injurious effect  
14 on the jury verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993).

15 Furthermore, the factual findings of the state court are presumed correct. 28 U.S.C. §  
16 2254(e)(1). A state court's factual determination may not be overturned unless this court cannot  
17 "reasonably conclude that the finding is supported by the record. *Cook v. Schriro*, 516 U.S. 802, 816  
18 (9th Cir. 2008); *Miller-El v. Cockrell*, 537 U.S. 32 (2003) (stating "[f]actual determinations by state  
19 courts are presumed correct absent clear and convincing evidence to the contrary" and a decision  
20 made by a state court based upon a factual determination "will not be overturned...unless objectively  
21 unreasonable in light of the evidence presented in the state-court proceeding"). Petitioner has not  
22 shown that the Nevada Supreme Court's decision with respect to this claim was an unreasonable  
23 application of federal law. Moreover, petitioner did not meet his burden in demonstrating that the  
24 court's decision was unreasonable in light of the evidence presented in the state court proceedings.  
25 This court will deny ground one.

26 ///

1           **B. Ground Five**

2           In petitioner's fifth ground for relief he appears to be claiming that he was deprived of  
3 effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendment, because his  
4 trial counsel failed to adequately undermine or prevent the prior bad act testimony of Tamara Mathes  
5 and Gypsy Gentry at trial, who each testified to separate episodes wherein the petitioner allegedly  
6 engaged in inappropriate physical contact with them. The underlying grounds, ground three and  
7 four, in which petitioner alleges that the trial court erred in allowing Mathes and Gentry to testify and  
8 this error rendered the trial fundamental unfair, were found to be unexhausted, and were abandoned..

9           In order to prove ineffective assistance of counsel, petitioner must show (1) counsel  
10 acted deficiently, in that his attorney made errors so serious that his actions were outside the scope of  
11 professionally competent assistance and (2) the deficient performance prejudiced the outcome of the  
12 proceeding. *Strickland v. Washington*, 466 U.S. 668, 687-90 (1984). Regarding the first prong –  
13 commonly known as the “effectiveness prong” – the *Strickland* Court expressly declined to articulate  
14 specific guidelines for attorney performance beyond generalized duties, including the duty of loyalty,  
15 the duty to avoid conflicts of interest, the duty to advocate the defendant's cause, and the duty to  
16 communicate with the client over the course of the prosecution. *Id.* Defense counsel's duties are not  
17 to be defined so exhaustively as to give rise to a “checklist for judicial evaluation ... [because] [a]ny  
18 such set of rules would interfere with the constitutionally protected independence of counsel and  
19 restrict the wide latitude counsel must have in making tactical decisions.” *Id.*

20           The *Strickland* Court instructed that review of an attorney's performance must be  
21 “highly deferential,” and must adopt counsel's perspective at the time of the challenged conduct, in  
22 order to avoid the “distorting effects of hindsight.” *Id.* at 689. A reviewing court must “indulge a  
23 strong presumption that counsel's conduct falls within the wide range of reasonable professional  
24 assistance ... [and] the [petitioner] must overcome the presumption that ... the challenged action  
25 might be considered sound trial strategy.” *Id.* (citation omitted).

26           Construing the Sixth Amendment to guarantee not effective counsel per se, but rather



1 a fair proceeding with a reliable outcome, the *Strickland* Court concluded that demonstrating that  
2 counsel fell below an objective standard of reasonableness alone is insufficient to warrant a finding  
3 of ineffective assistance. In order to satisfy *Strickland's* second prong, the defendant must show that  
4 the attorney's sub-par performance prejudiced the defense. *Id.* at 691-92. The test is whether there  
5 is a reasonable probability that, but for the attorney's challenged conduct, the result of the  
6 proceeding in question would have been different. *Id.* at 691-94. The Court defined reasonable  
7 probability as "a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

8 Ineffective assistance of counsel under *Strickland* requires a showing of deficient  
9 performance of counsel resulting in prejudice, "with performance being measured against an  
10 'objective standard of reasonableness,' . . . 'under prevailing professional norms.'" *Rompilla v.*  
11 *Beard*, 545 U.S. 374, 380 (2005) (quotations omitted). If the state court has already rejected an  
12 ineffective assistance claim, a federal habeas court may only grant relief if that decision was contrary  
13 to, or an unreasonable application of the *Strickland* standard. *See Yarborough v. Gentry*, 540 U.S. 1,  
14 5 (2003). There is a strong presumption that counsel's conduct falls within the wide range of  
15 reasonable professional assistance. *Id.*

16 Prior to trial the state moved for a *Petrocelli* hearing to determine whether testimony  
17 of several child victims regarding other acts of sexual activity would be admissible at trial. Exhibit  
18 25. Defense counsel opposed the motion. Exhibit 26. The trial court held a hearing on April 13,  
19 1005 and May 1, 1995. Exhibits 34 and 35. The state district court determined that testimony of  
20 Tamara Mathes and Gypsy Gentry would be admissible at trial. Exhibit 35. In his direct appeal  
21 petitioner alleged that the district court erred in admitting the testimony of Mathes and Gentry. The  
22 Nevada Supreme Court found the claim to be without merit, stating:

23 Appellant next argues that the district court erred in allowing two  
24 other young girls, similar in age to the victim, to testify that the appellant  
25 had inappropriately fondled and touched them. Based on our review of the  
26 record, we conclude that the district court did not commit manifest error in  
admitting such testimony. From evidence adduced during the *Petrocelli*  
hearings conducted in April and May, 1995, the district court concluded  
that the State had proven by clear and convincing evidence that appellant  
had inappropriately touched and fondled these girls at his home in 1991.

Because appellant's misconduct towards these girls constituted sexually aberrant behavior, the district court did not err by concluding that such evidence was relevant and that the probative value of such testimony was not substantially outweighed by the danger of unfair prejudice. Accordingly, we conclude that the district court did not err in admitting such evidence. *See Keeney v. State*, 109 Nev. 220, 228-29, 850 P.2d 311, 316-17 (1993).

Exhibit 95.

Petitioner argued in his state habeas petition that counsel should have called Denise Weathers, Danaye Spencer, and Kathy Dow as witnesses. Petitioner stated that these witnesses would have testified that the activities relating to Mathes were not sexual activities but instead constituted non-sexual horseplay, and therefore Mathes should not have been allowed to testify. After holding an evidentiary hearing on the issue, the state district court denied the claim. Exhibits 155, 156 and 168. On appeal, the Nevada Supreme Court affirmed the lower court's denial of the claim, finding:

First, the district court did not err when it concluded that NRS 176.515(3) barred consideration of Pruitt's petition based upon newly discovered evidence. NRS 176.515(3) states that "[a] motion for a new trial based on the ground of newly discovered evidence may be made only within 2 years after the verdict or finding of guilt." Here, since Pruitt was found guilty on November 27, 1995, and his petition for post-conviction relief was filed more than two years later on May 14, 1999, the district court correctly concluded that it was not obligated to consider the newly discovered evidence. Moreover, Pruitt's reliance upon the narrow exception articulated in *Snow v. State* [fn 1: 105 Nev. 521, 779 P.2d 96 (1989)] is misplaced because it is not applicable to non-capital cases, such as this one. In *Snow*, we stated:

[W]e are prepared to rule that where a prisoner *who has been sentenced to death* discovered new evidence tending to prove that his conviction was illegally obtained, such evidence may be brought before the court for consideration, even after the two-year time limit imposed by NRS 176.515(3) has run, in a petition for writ of habeas corpus. [fn 2: *Id.* at 523, 779 P.2d at 97 (emphasis added)].

Therefore, Pruitt's petition is barred by NRS 176.515(3).

Second, even if Pruitt's newly discovered evidence claim were not barred by the two-year time limit in NRS 176.515(3), the district court did not abuse its discretion when it concluded that Pruitt's petition was without merit because the newly discovered evidence was cumulative with the evidence that had been produced at trial. We have held that before

1 newly discovered evidence can justify a new trial, the evidence must be:

2 [N]ewly discovered; material to the defense; such that even  
3 with the exercise of reasonable diligence it could not have  
4 been discovered and produced for trial; non-cumulative;  
5 such as to render a different result probable upon retrial; not  
6 only an attempt to contradict, impeach, or discredit a former  
7 witness, unless the witness is so important that a different  
8 result would be reasonably probable; and the best evidence  
9 the case admits. [fn 3: *Sanborn v. State*, 107 Nev. 399, 406,  
10 812 P.2d 1279, 1284-85 (1991) (footnote omitted).]

11 Contrary to Pruitt's assertions, the fact that newly discovered  
12 evidence comes from another witness, [fn 4: *See Batson v. State*, 113 Nev.  
13 669, 677-78, 941 P.2d 478, 484 (1997) (holding that a witness's testimony  
14 was cumulative with the testimony of two other witnesses because it merely  
15 reiterated their testimony).] or from a different type of evidence altogether,  
16 [fn 5: *See Owens v. State*, 96 Nev. 880, 882, 620 P.2d 1236, 1237-38  
17 (1980) (holding that physical evidence admitted at trial to establish the  
18 defendant's identity was cumulative with eyewitness testimony elicited for  
19 the same purpose).] does not make that evidence non-cumulative.  
20 Evidence is cumulative if it is offered to prove a point that has already been  
21 proven by other evidence. [fn 6: *Black's Law Dictionary*, 343 (5th ed.  
22 1979).] Here, Pruitt produced evidence at the evidentiary hearing to  
23 demonstrate that: (1) Pruitt's prior conduct with two other girls was merely  
24 "non-sexual horseplay"; (2) his daughter had independently acquired sexual  
25 knowledge prior to the time she made her formal accusations to the police  
26 in 1993, but not before the time she told a friend during a camping trip in  
late July 1991 of her alleged molestation by Pruitt; (3) his daughter and her  
teenage boyfriend hated Pruitt; and (4) inconsistencies existed between his  
daughter's testimony and the physical evidence and other witness  
testimony.

18 However, all of this evidence is cumulative because other evidence  
19 was admitted at trial to prove the same propositions. For instance, at trial:  
20 (1) Pruitt's former wife testified about how Pruitt liked to "roughhouse"  
21 and "tease" children and family members; (2) there was testimony  
22 regarding tension between Pruitt and his daughter, and about how angry his  
23 daughter's teenage boyfriend was at being separated from her; and (3)  
24 Pruitt's trial counsel offered extensive evidence, such as a blueprint of  
25 Pruitt's house and a video and aerial map of Fort Churchill Road and other  
26 witness testimony to highlight the inconsistencies in the testimony of  
Pruitt's daughter.

23 ...

24 Third, the district court did not err when it concluded that Pruitt's  
25 ineffective assistance claim was without merit because his counsel acted  
26 with diligence and competence. When reviewing a claim of ineffective  
assistance, we generally adhere to the "reasonably effective assistance"  
standard articulated in *Strickland v. Washington*. [fn 9: 466 U.S. 668  
(1984).] Under this standard, a defendant claiming ineffective assistance

1 must demonstrate that:

2 (1) counsel's performance was deficient, i.e., counsel's  
 3 representation fell below an objective standard of  
 4 reasonableness, and (2) the deficient performance  
 5 prejudiced the defendant, i.e., "there is a reasonable  
 6 probability that, but for counsel's unprofessional errors, the  
 7 result of the proceeding would have been different." [fn 10:  
 8 *McNelson v. State*, 115 Nev. 396, 403, 990 P.2d 1263, 1268  
 9 (1999) (quoting *Strickland*, 466 U.S. at 694).]

10 We will defer to a district court's factual findings as to claims of ineffective  
 11 assistance; however, since ineffective assistance claims present mixed  
 12 questions of law and fact, we will still exercise independent review. [fn 11:  
 13 *Id.*] Nonetheless, "[c]ounsel's strategy decisions are not subject to  
 14 challenge absent extraordinary circumstances." [fn 12: *Doyle v. State*, 116  
 15 Nev. 148, 160, 995 P.2d 465, 473 (2000).]

16 While Pruitt alleges that his counsel rendered ineffective assistance  
 17 by permitting the admission of his prior bad acts, his counsel opposed the  
 18 admission of Pruitt's prior conduct as to the other girls at every  
 19 opportunity. Ultimately, this court concluded that the evidence was  
 20 admissible, and accordingly, Pruitt's minor criticisms regarding his  
 21 counsel's strategic decisions do not support a viable claim of ineffective  
 22 assistance. [fn 13: *See id.*] With regard to the admission of the prior  
 23 consistent statements of Pruitt's daughter, these statements were admissible  
 24 to show a lack of recent fabrication [fn 14: *See* NRS 51.035(2)(b) (allowing  
 25 the admission of prior consistent statements to rebut a charge of recent  
 26 fabrication).] and, accordingly, Pruitt was not prejudiced by his counsel's  
 failure to oppose the admission of this evidence. Pruitt's remaining  
 allegations as to his counsel's strategic decisions are without merit.

17 Exhibit 199.

18 Petitioner has not shown that the Nevada Supreme Court's determination was  
 19 objectively unreasonable. Defense trial counsel testified at the evidentiary hearing that he had  
 20 believed that the prior bad acts would not be admitted at trial because he was counsel on one of the  
 21 Nevada Supreme Court cases that discussed such prior bad acts, and he thought that the acts were  
 22 uncharged, unfounded, unsubstantiated and had no connection to the conduct in this case. Exhibit  
 23 156, T 212. Counsel stated that he did not consider calling other witnesses who were percipient to  
 24 the conduct Mathes alluded to in her testimony, because he did not believe the acts would be  
 25 admitted at trial. *Id.* Counsel also testified that he thought he was aware that there were witnesses to  
 26 the Mathes incident. *Id.* at T 214. Petitioner has not shown that counsel failed to adequately prevent

1 the prior bad act testimony from being admitted at trial.

2 Counsel did oppose the motion in limine to allow prior bad acts at trial, but  
3 determined that he would not call witnesses at the hearing. The United States Supreme Court has  
4 noted that “strategic choices made after thorough investigation of law and facts relevant to plausible  
5 options are virtually unchallengeable.” *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984).  
6 Furthermore, the Court stated that “strategic choices made after less than complete investigation are  
7 reasonable precisely to the extent that reasonable professional judgments support the limitations on  
8 investigation. In other words, counsel has a duty to make reasonable investigations or to make a  
9 reasonable decision that makes particular investigations unnecessary.” *Id.* See also *Wiggins v.*  
10 *Smith*, 539 U.S. 510, 521-23 (2003) (stating that a court must determine whether counsel’s tactical  
11 decision to not present mitigating evidence at sentencing was reasonable). Based upon a review of  
12 the entire record, the Nevada Supreme Court did not unreasonably apply federal law in finding that  
13 counsel did not perform deficiently.

14 Furthermore, the factual findings of the state court are presumed correct. 28 U.S.C. §  
15 2254(e)(1). A state court’s factual determination may not be overturned unless this court cannot  
16 “reasonably conclude that the finding is supported by the record. *Cook v. Schriro*, 516 U.S. 802, 816  
17 (9th Cir. 2008); *Miller-El v. Cockrell*, 537 U.S. 32 (2003) (stating “[f]actual determinations by state  
18 courts are presumed correct absent clear and convincing evidence to the contrary” and a decision  
19 made by a state court based upon a factual determination “will not be overturned...unless objectively  
20 unreasonable in light of the evidence presented in the state-court proceeding”). Petitioner has not  
21 shown that the Nevada Supreme Court’s decision with respect to this claim was an unreasonable  
22 application of *Strickland*. Moreover, petitioner did not meet his burden in demonstrating that the  
23 court’s decision was unreasonable in light of the evidence presented in the state court proceedings.  
24 This court will deny ground five.

### 25 C. Ground Six

26 In his sixth ground for relief petitioner alleges his conviction is in violation of his

1 Fifth, Sixth, and Fourteenth Amendment rights due to counsel's failure to interview and investigate  
2 witnesses Joyce Silva, Roberta Lamkin and Megan Higgins. Petitioner states that he was not aware  
3 that these witnesses had information relating to his case at the time of the trial.

4 At the evidentiary hearing Megan Higgins testified. Exhibit 155, T 8. Witness  
5 Higgins told the court that in September 1992 she had a conversation with the victim in a church  
6 parking lot. *Id.* at T 10-12. The victim told Higgins that although Mathes had accused her father of  
7 sexual abuse, her father had not abused Mathes. *Id.* Roberta Lamkin also testified at the evidentiary  
8 hearing. *Id.* at T 13. Lamkin worked with the victim at a restaurant. *Id.* at T 15. One day when  
9 Lamkin was driving the victim home from work they had a conversation about the petitioner and the  
10 victim stated that he had not sexually abused her. *Id.* at 16-17. The victim also told Lamkin that she  
11 wished her father would be more lenient with her. *Id.* at T 17. Finally, Joyce Silva testified at the  
12 hearing that she owned the restaurant where the victim worked. *Id.* at T 73. Silva knew that the  
13 victim was dating her boyfriend Chuck at the time her father was arrested. *Id.* at T 74. Silva  
14 testified that the victim had stated that she was going to get back at her father for not letting her go  
15 out with Chuck. *Id.* at T 75.

16 Defense trial counsel stated that he had presented evidence at trial that the victim had  
17 denied that any sexual abuse had occurred. Exhibit 156, T 240. Counsel also testified that he  
18 presented evidence that the victim and her boyfriend Chuck were angry with the petitioner and had a  
19 motive to make up the allegations. *Id.*

20 On appeal the Nevada Supreme Court affirmed the denial of this ground. Exhibit  
21 199. As was quoted above, in relation to ground five, the Nevada Supreme Court found that the  
22 petition was barred because the "newly discovered evidence" was not raised within two years after  
23 the finding of guilt. *Id.* Furthermore, the court found that even if the newly discovered evidence was  
24 timely raised, the evidence was cumulative to evidence raised at trial. *Id.* Finally, the court stated  
25 that the petitioner had not shown that counsel's strategic decisions were deficient. *Id.*

26 The Nevada Supreme Court's determination was not an objectively unreasonable

1 application of federal law, as determined by United States Supreme Court precedent. Petitioner  
2 states in his petition that he did not know, at the time of trial, that these witnesses had information  
3 that was relevant to his defense. Therefore, counsel would not be ineffective for failing to  
4 investigate these witnesses if it was not known at the time of trial that these witnesses had helpful  
5 information. Moreover, the court found that the testimony of these witnesses was cumulative. The  
6 factual findings of the state court are presumed correct. 28 U.S.C. § 2254(e)(1). Petitioner has failed  
7 to meet his burden of proving that the state court's ruling was contrary to, or involved an  
8 unreasonable application of, clearly established federal law, as determined by the United States  
9 Supreme Court, or that the ruling was based on an unreasonable determination of the facts in light of  
10 the evidence presented in the state court proceeding. This Court will deny habeas relief as to ground  
11 six.

#### 12 **D. Ground Nine**

13 In his ninth ground for relief petitioner alleges that his conviction is in violation of his  
14 Fifth, Sixth, and Fourteenth Amendment rights due to the fact that there was no corroboration of the  
15 victim's testimony apart from Kevin's testimony and the victim's out-of-court statements made to  
16 witnesses Rehder and Mathes. Petitioner states that the victim's out-of-court statements were  
17 inadmissible hearsay. Petitioner then contends that trial counsel was ineffective for failing to  
18 prevent the admission of the hearsay evidence.

19 The Nevada Supreme Court affirmed the lower court's denial of this claim, stating the  
20 following:

21 With regard to the admission of the prior consistent statements of Pruitt's  
22 daughter, these statements were admissible to show a lack of recent  
23 fabrication [fn 14: See NRS 51.035(2)(b) (allowing the admission of prior  
24 consistent statements to rebut a charge of recent fabrication).] and,  
25 accordingly, Pruitt was not prejudiced by his counsel's failure to oppose the  
26 admission of this evidence. Pruitt's remaining allegations as to his  
counsel's strategic decisions are without merit.

25 Exhibit 199. The Nevada Supreme Court's determination is not objectively unreasonable. Petitioner  
26 contends that the victim's out-of-court statements were inadmissible hearsay under NRS



1 51.035(2)(b). The Nevada Supreme Court determined that the statements were *admissible* under that  
2 same Nevada statute. When a state interprets its own laws or rules, no basis for federal habeas  
3 corpus relief is presented, as no federal constitutional question arises. *Burkey v. Deeds*, 824 F. Supp.  
4 190, 192 (D. Nev. 1993) (citing *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991)); *Oxborrow v.*  
5 *Eikenberry*, 877 F.2d 1395 (9th Cir. 1999) (“errors of state law do not concern us unless they rise to  
6 the level of a constitutional violation”). Moreover, a state law issue cannot be mutated into one of  
7 federal constitutional law merely by invoking the specter of a due process violation. *Langford v.*  
8 *Day*, 110 F.3d 1380, 1389 (9th Cir. 1996), *cert. denied*, 522 U.S. 881 (1997). Petitioner must  
9 demonstrate the existence of federal constitutional law which establishes the right in question. It  
10 appears that the Nevada Supreme Court was interpreting the Nevada statutes when it determined that  
11 the victim’s prior consistent statements were admissible and that counsel was not ineffective for  
12 objecting. Therefore, no federal question has been raised.

13           Even if a federal question was properly raised in this ground for relief, petitioner  
14 cannot show that he is entitled to relief. The Nevada Supreme Court found the victim’s out-of-court  
15 statements were admissible to show a lack of recent fabrication. The factual findings of the state  
16 court will be presumed correct unless the petitioner rebuts this presumption with clear and  
17 convincing evidence. 28 U.S.C. § 2254(e)(1). As petitioner has not shown that the lower court’s  
18 decision was unreasonable based on the evidence presented in the state court, ground nine will be  
19 denied.

## 20 **V. Certificate of Appealability**

21           In order to proceed with an appeal from this court, petitioner must receive a certificate  
22 of appealability. 28 U.S.C. § 2253(c)(1). Generally, a petitioner must make “a substantial showing  
23 of the denial of a constitutional right” to warrant a certificate of appealability. *Id.* The Supreme  
24 Court has held that a petitioner “must demonstrate that reasonable jurists would find the district  
25 court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S.  
26 473, 484 (2000).



1 The Supreme Court further illuminated the standard for issuance of a certificate of  
2 appealability in *Miller-El v. Cockrell*, 537 U.S. 322 (2003). The Court stated in that case:

3 We do not require petitioner to prove, before the issuance of a COA, that  
4 some jurists would grant the petition for habeas corpus. Indeed, a claim  
5 can be debatable even though every jurist of reason might agree, after the  
6 COA has been granted and the case has received full consideration, that  
7 petitioner will not prevail. As we stated in *Slack*, “[w]here a district court  
has rejected the constitutional claims on the merits, the showing required  
to satisfy § 2253(c) is straightforward: The petitioner must demonstrate  
that reasonable jurists would find the district court’s assessment of the  
constitutional claims debatable or wrong.”

8 *Id.* at 1040 (quoting *Slack*, 529 U.S. at 484).

9 The court has considered the issues raised by petitioner, with respect to whether they  
10 satisfy the standard for issuance of a certificate of appeal, and the court determines that none meet  
11 that standard. Accordingly, the court will deny petitioner a certificate of appealability.

12 **IT IS THEREFORE ORDERED** that the petition for a writ of habeas corpus  
13 (docket #1) is **DENIED**.

14 **IT IS FURTHER ORDERED** that the clerk shall **ENTER JUDGMENT**  
15 **ACCORDINGLY**.

16 **IT IS FURTHER ORDERED** that petitioner is **DENIED A CERTIFICATE OF**  
17 **APPEALABILITY**.

18  
19 Dated this 16<sup>th</sup> day of September, 2009.

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21   
22 CHIEF UNITED STATES DISTRICT JUDGE  
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